1209 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT CAUSING INJURY, ILLNESS, DISEASE OR IMPAIRMENT OF A SEXUAL OR REPRODUCTIVE ORGAN, OR MENTAL ANGUISH REQUIRING PSYCHIATRIC CARE — § 940.225(2)(b)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) did not consent to the sexual (contact) (intercourse).
3. The defendant caused (injury to (name of victim)) (illness to (name of victim)) (disease or impairment of a sexual or reproductive organ of (name of victim)) (mental anguish requiring psychiatric care for (name of victim)).[1]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

Comment

This instruction was originally published in 1980 as Wis JI-Criminal 1210 [for sexual intercourse offenses] and Wis JI-Criminal 1211 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1209 was published in 1996 and revised in 2001 and 2009. The 2009 revision involved amendments to footnote 1. This revision was approved by the Committee in December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing

separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. No further definition is attempted for any of the alternatives for this element. Before the 2008 revision, the text referred to "bodily injury." The Committee decided to delete "bodily" because it does not appear in the definition of the offense and may invite problems in connection with defining "injury." "Injury" is not defined in the sexual assault statute, in the general definitions provided in Chapter 939, or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 940.225(2)(b), the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977 CR, March 20, 2008. [Ordered not published, April 30, 2008.] However, in a prosecution under § 346.63(2)(a), where "injury" is also used, the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03 0227 CR, July 8, 2003. [Ordered not published, August 27, 2003.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

It is not clear what is intended by the reference in the statute to "sexual or reproductive organs." The phrase is not defined in the statutes or by prior case law, although the Sexual Assault Law uses the term "intimate parts" in defining sexual contact (§ 940.225(5)(b)). According to cases from other states, "sexual or reproductive organs" include the immediate vicinity of the genital organs as well as the organs themselves, State v. Nash, 83 N.H. 536, 145 A. 262 (N.H. 1929); and it does not include the breasts, State v. Moore, 194 Ore. 232, 241 P.2d 455 (Ore. 1952).

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally

ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).